

Gary S. Graifman, Esq.
**KANTROWITZ, GOLDHAMER
& GRAIFMAN, P.C.**
210 Summit Avenue
Montvale, NJ 07645
Tel: (201) 391-7000
Fax: (201) 307-1086
ggraifman@kgglaw.com

Counsel for Plaintiffs

[Additional Counsel Listed on Signature Page]

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

STEVEN BRODY et al., on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

MERCK & CO., INC., f/k/a
SCHERING-PLOUGH CORPORATION,
et al.,

Defendants.

Case No. 3:12-cv-04774-PGS-DEA

*DOCUMENT ELECTRONICALLY
FILED*

MOTION DATE: July 15, 2013

NOTICE OF PLAINTIFFS' MOTION TO STRIKE

PLEASE TAKE NOTICE THAT on July 15, 2013, pursuant to Local Rule 7.1, Plaintiffs Steven Brody, Chaim Hirschfeld and Suzanne Grunstein (“Plaintiffs”) shall move before the Honorable Peter G. Sheridan, U.S.D.J., at the United States District Court, Martin Luther King, Jr. Federal Courthouse, 50 Walnut Street, Newark, New Jersey, for an Order Striking the Untimely Responses of Fatima Dorego (Docket No. 78) and Christopher Batman (Docket No. 79). In support of their motion, Plaintiffs shall rely upon the accompanying motion and incorporated memorandum of law, the Declaration of Ximena R. Skovron, Esq., and all pleadings and documents filed in this action and related proceedings.

A proposed Order is attached hereto as Exhibit A.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 78.1(b), Plaintiffs request oral argument of this motion.

DATED: June 10, 2013

**KANTROWITZ, GOLDHAMER
& GRAIFMAN, P.C.**

/s/ Gary S. Graifman
Gary S. Graifman, Esq.
210 Summit Avenue
Montvale, NJ 07645
Tel: (201) 391-7000
Fax: (201) 307-1086
ggraifman@kgglaw.com
Counsel for Plaintiffs

**ABRAHAM, FRUCHTER
& TWERSKY, LLP**

Mitchell M.Z. Twersky, Esq. (*pro hac vice*)

Ximena R. Skovron, Esq. (*pro hac vice*)

One Penn Plaza, Suite 2805

New York, NY 10119

Tel: (212) 279-5050

Fax: (212) 279-3655

mtwersky@aftlaw.com

xskovron@aftlaw.com

Settlement Class Counsel

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

STEVEN BRODY et al., on behalf of
themselves and all others similarly
situated,

Plaintiff,

vs.

MERCK & CO., INC., f/k/a
SCHERING-PLOUGH CORPORATION,
et al.,

Defendants.

Case No. 3:12-cv-04774-PGS-DEA

*DOCUMENT ELECTRONICALLY
FILED*

MOTION DATE: June 17, 2013

**[PROPOSED] ORDER STRIKING THE RESPONSES OF
FATIMA DOREGO AND CHRISTOPHER BATMAN**

Plaintiffs' Motion to Strike the Responses of Objectors Fatima Dorego and Christopher Batman, having been brought before the Court; and

The Court having considered the papers submitted by Plaintiffs, and having heard oral presentations by Plaintiffs and the Objectors,

ORDERED AND DECREED that Docket Nos. 78 and 79 are hereby stricken from the record.

DATED: June __, 2013

HON. PETER G. SHERIDAN, U.S.D.J.

Gary S. Graifman, Esq.
**KANTROWITZ, GOLDHAMER
& GRAIFMAN, P.C.**
210 Summit Avenue
Montvale, NJ 07645
Tel: (201) 391-7000
Fax: (201) 307-1086
ggraifman@kgglaw.com

Counsel for Plaintiffs

[Additional Counsel Listed on Signature Page]

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

STEVEN BRODY et al., on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

MERCK & CO., INC., f/k/a
SCHERING-PLOUGH CORPORATION,
et al.,

Defendants.

Case No. 3:12-cv-04774-PGS-DEA

*DOCUMENT ELECTRONICALLY
FILED*

MOTION DATE: July 15, 2013

**PLAINTIFFS' MOTION TO STRIKE AND
INCORPORATED MEMORANDUM OF LAW**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BACKGROUND	1
ARGUMENT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	Page(s)
<i>In re Baby Products Antitrust Litig.</i> , 708 F.3d 163 (3d Cir. 2013)	1, 2, 3, 4
<i>Leer Elec., Inc. v. Schmerin</i> , 2011 U.S. Dist. LEXIS 139415 (M.D. Pa. Dec. 2, 2011)	3
<i>Lue-Martin v. March Group, L.L.L.P.</i> , 379 Fed. Appx. 190 (3d Cir. 2010).....	4
Statutes and Rules	
L.Civ.R. 7.1	1, 2
L.Civ.R. 7.1(d)(1)	2
L. Civ. R. 7.1(d)(2)	2
L.Civ.R. 7.1(d)(3)	2
L.Civ. R. 7.1(d)(4)	3
L.Civ.R. 7.1(d)(5)	2, 3
L.Civ. R. 7.1(d)(7)	3
L. Civ. R. 7.2.....	2

BACKGROUND

Plaintiffs herein respectfully move the Court to strike Docket Numbers 78 and 79 from the record. Both documents pertain to the pending Motion to Require the Posting of Appeal Bonds by Objector Appellants (Docket No. 73) (the “Appeal Bonds Motion”). The Motion date for the Appeal Bonds Motion is June 17, 2013. Pursuant to Local Civil Rule 7.1, opposition briefs were due June 3, 2013 and Plaintiffs’ reply brief was due June 10, 2013.

Docket Number 78 is a two-sentence document filed on June 7, 2013 by Objector Fatima Dorego (“Dorego”) purporting to join in the other objectors’ briefs (the “Untimely Dorego Statement”). Dorego inexplicably filed this document without leave of Court *four days after* the deadline for filing an opposition brief had expired.

Docket Number 79 is a “corrected” brief filed by Objector Christopher Batman (“Batman”) on June 10, 2013, *one week after* the expiration of the deadline for filing opposition briefs (the “Untimely Batman Brief”). The Untimely Batman Brief purports to correct false information furnished to the Court regarding Batman’s claimed role as an objector in *In re Baby Products Antitrust Litig.*, No. 12-1165, 12-1166, 12-1167, 708 F.3d 163 (3d Cir. 2013), a decision that Objector Batman erroneously asserts is “exactly on point” with the instant action. Batman Brief in Opposition at 14.

The Untimely Batman Brief was filed on the same day as the Plaintiffs' reply brief in support of the Appeal Bonds Motion was due, without first obtaining leave of Court, without providing any explanation, and without any information provided to the Court as to the nature of the changes being made by counsel. Plaintiffs have not had an adequate opportunity to review the Untimely Batman Brief prior to the filing of their reply brief, and are therefore prejudiced by its filing. The Untimely Batman Brief, moreover, fails to remove all of the false information previously furnished to the Court. *See* Untimely Batman Brief at 14 (asserting that "This Court's decision directly contradicts the Third Circuit's ruling *in Batman's previous successful appeal* in *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013). . . .") (emphasis added). Because both Dorego and Batman's filings violate Local Civil Rule 7.1, they should be stricken.

ARGUMENT

Local Civil Rule 7.1, which governs motion practice in this District, provides that oppositions to motions "must be filed with the Clerk at least 14 days prior to the original motion day, unless the Court otherwise orders, or an automatic extension is obtained pursuant to L.Civ.R. 7.1(d)(5)." L. Civ. R. 7.1(d)(2). Local Civil Rule 7.2 outlines the requirements for briefs. *See* L.Civ. R. 7.2. Additionally, "[i]n lieu of filing any brief pursuant to L.Civ.R. 7.1(d)(1), (2) or (3), a party may file a statement that no brief is necessary and the reasons therefor."

L.Civ. R. 7.1(d)(4). Finally, Local Civil Rule 7.1 empowers the Court to “reject any brief or other paper not filed within the time specified.” L.Civ. R. 7.1(d)(7).

Here, Dorego did not file a brief or statement in lieu of a brief by June 3, 2013, the deadline for opposition briefs, nor did she seek the automatic extension pursuant to L.Civ.R. 7.1(d)(5) – one that is readily available to litigants who need additional time for a filing. If Dorego wanted to oppose the instant Appeal Bonds Motion as the Court rules permit, she would have undertaken to send a letter to the Clerk asking for the automatic extension. Moreover, the Untimely Dorego Statement does not otherwise comply with Local Civil Rule 7.1(d)(4). Thus, because it is both untimely and defective, the Untimely Dorego Statement should be stricken. *See, e.g., Leer Elec., Inc. v. Schmerin*, No. 1:08-CV-1785, 2011 U.S. Dist. LEXIS 139415, at *19 (M.D. Pa. Dec. 2, 2011) (striking untimely reply brief).

Similarly, the Untimely Batman Brief was filed on June 10, 2013, a full week after opposition briefs were due, and it should also be stricken. L.Civ. R. 7.1(d)(7); *Leer*, 2011 U.S. Dist. LEXIS 139415, at *19. The Untimely Batman Brief purports to rectify false information provided to the Court in Batman’s original response. Specifically, Batman represented that he was an objector and “prevailed on appeal in *In re Baby Products Antitrust Litig.*, No. 12-1165, 12-1166, 12-1167, 708 F.3d 163 (3d Cir. 2013),” a claim that is false and made even more

egregious because *Baby Products* is a decision upon which Batman relies extensively. When undersigned counsel contacted Batman's counsel regarding these outrageous misrepresentations, his counsel claimed they were "inadvertent" -- a claim that strains credulity since Batman's involvement in *Baby Products* was specifically asserted in *three separate places* in Batman's brief. Batman Br. at 9, 14, 16. See Declaration of Ximena R. Skovron and Ex. A (E-mail of Samuel Myles, Esq.). The filing of the Untimely Batman Brief is patently unfair and prejudicial to Plaintiffs because among other things, there is no assurance that Batman did not take the opportunity to "correct" other arguments, unbeknownst to Plaintiffs, who would then be deprived of an opportunity to respond to such new material. Indeed, even the purported correction is erroneous, as the Untimely Batman Brief still falsely claims that Batman successfully appealed in *Baby Products*. Untimely Batman Brief at 14.

Even if the Untimely Batman Brief did correct the misrepresentations made in the original filing, there is no authority for filing a brief out of time to "correct" the substance of the brief without leave of Court. If so, any litigant could simply file any brief with no regard to applicable court rules or deadlines under the guise of "correction." Such conduct is unfair to other litigants and makes a mockery of Court rules and deadlines, and should not be encouraged. *Lue-Martin v. March Group, L.L.L.P.*, 379 Fed. Appx. 190, 192 (3d Cir. 2010) (upholding the granting

of a motion to strike a counter-statement of undisputed material facts because it had not been timely filed; the untimely filer has “a heavy burden to bear, as matters of docket control ... are committed to the sound discretion of the district court.”).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court strike the Joinder of Fatima Dorego to Cindy Beck and Christoher [sic] Batman’s Oppositions to Plaintiffs’ Motion to Require Posting of Appeal Bond by Objector-Appellants (Docket No. 78), and the Corrected Opposition of Christopher Batman to Motion for Appeal Bond (Docket No. 79).

DATED: June 10, 2013

**KANTROWITZ, GOLDHAMER
& GRAIFMAN, P.C.**

/s/ Gary S. Graifman

Gary S. Graifman, Esq.

210 Summit Avenue

Montvale, NJ 07645

Tel: (201) 391-7000

Fax: (201) 307-1086

ggreifman@kgglaw.com

Counsel for Plaintiffs

**ABRAHAM, FRUCHTER
& TWERSKY, LLP**

Mitchell M.Z. Twersky, Esq. (*pro hac vice*)

Ximena R. Skovron, Esq. (*pro hac vice*)

One Penn Plaza, Suite 2805

New York, NY 10119

Tel: (212) 279-5050

Fax: (212) 279-3655

mtwersky@aftlaw.com

xskovron@aftlaw.com

Settlement Class Counsel

Gary S. Graifman, Esq.
**KANTROWITZ, GOLDHAMER
& GRAIFMAN, P.C.**
210 Summit Avenue
Montvale, NJ 07645
Tel: (201) 391-7000
Fax: (201) 307-1086
ggraifman@kgglaw.com

Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

STEVEN BRODY et al., on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

MERCK & CO., INC., f/k/a
SCHERING-PLOUGH CORPORATION,
et al.,

Defendants.

Case No. 3:12-cv-04774-PGS-DEA

*DOCUMENT ELECTRONICALLY
FILED*

DECLARATION OF XIMENA R. SKOVRON, ESQ.

I, Ximena R. Skovron, Esq., declare as follows:

1. I am an associate in the law firm of Abraham, Fruchter & Twersky, LLP, which has been appointed Settlement Class Counsel in this action (“AF&T” or “Firm”). I submit this Declaration in Support of Plaintiffs’ Motion to Require the Posting of Appeal Bonds by Objector-Appellants and Plaintiffs’ Motion to Strike.

2. On June 6, 2013, I contacted counsel for Christopher Batman to request documentation of his claim that Batman had been an objector in *In re Baby Products Antitrust Litigation*, No. 12-1165, 12-1166, and 12-1167, 708 F.3d 163 (3d Cir. 2013). On June 7, 2013, I sent him a follow-up e-mail to him. Both my e-mail and his response are attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 10th day of June, 2013, at New York, New York.



Ximena R. Skovron

EXHIBIT A

From: Samuel J. Myles [<mailto:smyles@holstonlaw.com>]
Sent: Friday, June 07, 2013 4:01 PM
To: Ximena R. Skovron
Subject: RE: Brody v. Merck, 12-cv-04774 (D.N.J.)

Hi Ximena –

I am looking into this. This may have been an inadvertent error on our part as Mr. Batman may have objected in other cases but not that one. If so, I will file a letter and corrected brief with the court on Monday. I apologize for any inconvenience.

Thanks,

Sam

Samuel J. Myles, Esq.
**HOLSTON, MacDONALD, UZDAVINIS,
ZIEGLER & LODGE, P.A.**
66 Euclid Street
Woodbury, NJ 08096
856-848-5858 (phone)
856-848-1898 (fax)
smyles@holstonlaw.com
www.holstonlaw.com

From: Ximena R. Skovron [<mailto:XSkovron@aftlaw.com>]
Sent: Friday, June 07, 2013 12:32 PM
To: smyles@holstonlaw.com
Cc: Mitchell M.Z. Twersky; Lawrence D. Levit
Subject: Brody v. Merck, 12-cv-04774 (D.N.J.)

Samuel,

In follow up to the voice mail I left yesterday, kindly forward at your earliest convenience any document that supports your claim regarding your client's role as an objector- appellant in the Baby Products Antitrust Litigation or that your firm was otherwise involved in representing the appellants. We cannot find any indication in the record of that appeal that your client (or your firm) was involved.

Please feel free to contact me should you wish to discuss.

Best regards,

Ximena R. Skovron, Esq.
Abraham, Fruchter & Twersky, LLP
One Penn Plaza, Suite 2805
New York, New York 10119
Tel: (212) 279-5050 ext. 1606

Fax: (212) 279-3655
xskovron@aftlaw.com
www.aftlaw.com



ABRAHAM, FRUCHTER & TWERSKY, LLP

=====

NOTICE

This e-mail message is intended only for the named recipient(s) above. It may contain confidential information that is privileged or that constitutes attorney work product. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this e-mail and any attachment(s) is strictly prohibited. If you have received this e-mail in error, please immediately notify the sender by replying to this e-mail and delete the message and any attachment(s) from your system. Thank you.

=====

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2013, I caused to be filed, via electronic filing, the following documents with the United States District Court for the District of New Jersey:

1. NOTICE OF PLAINTIFFS' MOTION TO STRIKE;
2. MOTION TO STRIKE; and
3. DECLARATION OF XIMENA R. SKOVRON, ESQ.

I hereby certify that on this date, I caused copies of the foregoing documents to be served via ECF:

Eric F. Gladbach
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022
egladbach@reedsmith.com

John P. Hooper, Esq.
REED SMITH, LLP
599 Lexington Avenue
22nd Floor
New York, New York 10022
jhooper@reedsmith.com

Forrest S. Turkish, Esq.
LAW OFFICES OF FORREST S. TURKISH
595 Broadway
Bayonne, NJ 07002
fsturkish@aol.com

Samuel J. Myles, Esq.
HOLSTON, MACDONALD, UZDAVINIS & ZIEGLER, P.C.
66 Euclid Street
P.O. Box 358
Woodbury, NJ 08096
smyles@holstonlaw.com

Robert E. Margulies, Esq.
MARGULIES WIND, P.C.
Harborside Financial Center
Plaza 10
3 Second Street, Suite 1201
Jersey City, NJ 07311
rem@mwhlawfirm.com

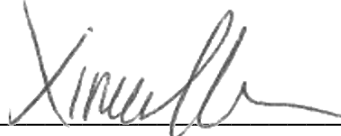
I further certify that on this date, I served a copy of the foregoing documents on the following by first class postage prepaid U.S. Mail and by electronic mail:

Jeffrey Weinstein
WEINSTEIN LAW
518 East Tyler Street
Athens, TX 75751
jeff@longhornlawyer.com

I further hereby certify that I have provided courtesy copies of the foregoing documents by Federal Express to the Honorable Peter G. Sheridan, U.S.D.J., pursuant to Local Civil Rule 5.2 and Electronic Case Filing Policies and Procedures.

Dated: June 10, 2013

ABRAHAM, FRUCHTER &
TWERSKY, LLP

A handwritten signature in black ink, appearing to read 'Ximena R. Skovron', is written over a horizontal line.

Ximena R. Skovron

One Penn Plaza, Suite 2805
New York, NY 1011
Tel: (212) 279-5050
Fax: (212) 279-3655
xskovron@aftlaw.com